Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, AND JOHN WEIS,
APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDWELL, AND WILLIAM M. YATES,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Appellees' Motion to Dismiss.

LAURENCE H. TRIBE,
Special Counsel, City of Boston,
Langdell Hall,
Cambridge, Massachusetts 02138.
(617) 495-4621

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

October Term, 1978.

No. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, and JOHN WEIS,
Appellants,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDWELL, and WILLIAM M. YATES,
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Appellees' Motion to Dismiss.

This brief is in opposition to Appellees' Motion to Dismiss in the above-captioned case.

1. Appellees conceded on October 21, 1978, in their Motion for Reconsideration before Mr. Justice Brennan (p. 4) that "plenary review is desirable and appropriate" in this case. They now urge that the appeal be dismissed for want of a substantial federal question — despite that concession, and despite this Court's action on November 6, 1978, in refusing to vacate Mr. Justice Brennan's stay of October 20, 1978. Even if such summary disposition were not peculiarly inappropriate under these circumstances, it would be substantively unwarranted.

In their most recent submission, Appellees seek to avoid the explicit holding of the Court below that Mass. Gen. Laws ch. 55 operates to "bar municipalities from engaging in the expenditure of funds to influence election results." J.S. 8a. To treat Chapter 55 as "peripheral," Motion to Dismiss 8, and to focus solely on the Home Rule Amendment, is simply to misstate what the Supreme Judicial Court held.[1] In any event, the judgment below obviously does not become more defensible when recast as upholding the Home Rule Amendment (in addition to Chapter 55) over Appellants' First and Fourteenth Amendment challenge. What the Court below *did* is unmistakable: Having broadly construed municipal home rule powers, J.S. at 6a-7a, the Court found in state statutory law a ban on certain municipal advocacy activities[2] — not those directed by municipalities to the legislature, J.S. 11a n.11, or those dealing with non-referendum issues, J.S. 9 n.7, but only those addressing the people on referendum questions.

[1] Although the Supreme Judicial Court observed that the Home Rule Amendment authorizes a municipality to exercise any power that the legislature could confer upon it so long as the exercise of such power is not inconsistent with state statute, only Chapter 55 was held to prohibit municipal advocacy. J.S. 7a-8a.

[2] As to Appellees' suggestion that only money and not speech is involved, Motion to Dismiss 11-12, *see* J.S. 14 n.13.

Thus, whatever the current vitality of such decisions as *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), this case squarely involves the power of the state to engage in selective control over speech — directing not only who may speak but on what subjects and to what audiences.[3] The applicability of *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), to such selective control where municipal corporations are the speakers but private citizens are the listeners quite clearly presents a substantial federal question. *Cf. Madison Joint School Dist.* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.7 (1976); J.S. 21 n.21.

2. Although stressing in the Court below the unfairness of municipal advocacy to dissenting taxpayers, Plaintiffs' Brief at 15, Appellees seek in this Court to minimize the degree to which that concern underlay the holding below, denying "that the 'Supreme Judicial Court in fact upheld a federal right on the part of . . . dissenting taxpayers' (J.S. 32) . . .." Motion to Dismiss 12-13. On the contrary, after canvassing other interests that it deemed compelling, the Supreme Judicial Court treated *only* the interest in protecting "a dissenting minority of taxpayers," J.S. 20a, as justifying the ban in this case. J.S. 27-37. And in support of such an interest, the Court below relied exclusively on *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and on *Wooley* v. *Maynard*, 430 U.S. 705 (1977). J.S. 20a-21a & nn.19-20. That the Supreme Judicial Court's reference to these two cases may have been "brief," Motion to

[3] Just as the theoretical power of a state to make city officials appointive rather than elective implies no authority to allocate votes unequally in a city election, *see Sailors* v. *Board of Education*, 387 U.S. 105, 108-111 (1967); *Avery* v. *Midland County*, 390 U.S. 474, 484-486 (1968); *Hadley* v. *Junior College Dist.*, 397 U.S. 50, 58-59 (1970), so a state's theoretical power to make its cities and towns mere administrative arms of the central government, with no voices of their own, implies no authority to subject municipal advocacy to discriminatory, content-based regulation.

Dismiss 15 n.1, cannot obscure the fact that its reliance upon them was decisive.[4] Thus, the second of the Questions Presented, J.S. 5, warrants plenary review, *whether or not* a selective state ban on municipal advocacy would be otherwise reviewable.

3. For the foregoing reasons, Appellants respectfully request that Appellees' Motion to Dismiss the appeal be denied.

LAURENCE H. TRIBE,
Counsel for Appellants.

November 16, 1978.

[4]Inasmuch as the Court below found in the record no showing that the challenged advocacy actually threatened electoral fairness, J.S. 19a n.18, that rationale neither did nor could suffice to support the injunction entered below. *See* J.S. 27-28 & n.24.